

ISSUES IN BROADCASTING

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(i) Introduction:

A critical stance towards broadcasting regulation and the Canadian Radio-television and Telecommunications Commission is useful, insofar as it leads to a reassessment of the goals in broadcasting regulation and their implementation through regulation or any other means. The situation has changed since 1968 when the CRTC was created. An evaluation of the objectives and methods of broadcasting regulation is called for in light of these changes.

Two kinds of changes should concern us. The first has little to do with regulation as such. It is related to the broadcasting environment. The technologies, industry, public expectations and relationships between the participants in broadcasting have been fundamentally altered in the last eighteen years. If one considers the CRTC to have been successful, and some do not, a re-evaluation of broadcasting regulation would still be necessary. In this report, these changes in the broadcasting environment will be discussed to see what options they pose for broadcasting policy today.

The second type of change is related to the regulation of broadcasting. The last two decades of broadcasting regulation under the CRTC cannot be understood as a single phenomenon -- either as a success or a failure. Significant changes have occurred in the approach taken to broadcasting regulation within this time period. Some problems with broadcasting regulation *do* stem from the actions of the CRTC. Many more are a product of the shifting orientation of the regulator in response to the changing environment in broadcasting. It is too easy to lay blame, to condemn the exercise of regulation as futile or a

mainly symbolic. A much better approach is to identify *how* regulation has responded to the continuing changes in the broadcasting environment by taking different approaches at different times. The future will not look like the past, and the future of broadcasting policy is what should concern us now. An examination of the different approaches to regulation should provide a basis for the development of a new one.

It is not likely that broadcast regulation will be discarded. For all its problems, regulation does provide a framework for the administration of a complex industrial and cultural sector. Significant deregulation is difficult to imagine; reregulation is the option being discussed widely. Even significant changes to the Broadcasting Act will require a genuine commitment on the part of governments, if those changes are to result in a different orientation to broadcasting. We do need to imagine what could be done if we had a blank slate, if we could begin anew in designing a regulatory system, but we also need to consider the actual range of options available with respect to the approach of regulators and the various issues in Canadian broadcasting.

The purpose of this report is two-fold. First, it is to identify -- in very broad terms -- the regulatory orientation of the CRTC in various periods of its eighteen year history, to lay the basis for a discussion of the regulatory approach that should be taken in the future. The framework for this evaluation is drawn from another report to the Task Force, a report on "Methods of Regulation".

In that report it is suggested that governments and regulators make a series of choices about their approach to and methods of regulation. For example, they choose between regulation and quasi-regulation (the use of non-regulatory bodies to accomplish the same objectives of regulation). They choose to provide benefits (a regulatory "safety net"), or to entrench rights (involving redistribution of resources) or to sustain social values (regulations on Canadian ownership, for example) through regulation. They decide whether regulation should be initiatory or pro-active, in the sense of seeking out innovative ways to implement policy (such as was done in the case of FM). Alternatively, regulators can rely on market intervention or on a managerial approach to achieve their objectives. Finally, they choose the method of regulation: whether to simply apply rules, to issue permits, to create an independent tribunal or to rely on processes of mediation to deal with interest group conflicts. In the past eighteen years, different choices that have been made about the appropriate methods of regulation. What are these choices? What choices should be made now?

The second purpose of this report is to identify some of the key problems in broadcasting environment today, so that the options for solutions -- some regulatory, some not -- can also be identified. This task can only be done by taking an overview of the broadcasting system. As a result, this report is not a research report, in the narrow sense of the term research. The reader will find no detailed descriptions of the Canadian broadcasting system; the Task Force has conducted its own extensive research. Instead, this report will provide a framework for the integration of research materials. Indeed, it is one of many possible frameworks and its value will lie in its approach: a clear delineation of some of the options with respect to commonly understood problems in broadcasting regulation.

Any delineation of options rests upon the values of its authors. Lest there be any question about the values in this report, they should be stated here. Three objectives outweigh all others in relation to the Canadian broadcasting system. They are, as follows:

- the protection of public broadcasting, including the CBC but also the community and educational services.
- the protection of a strong Canadian presence in the Canadian broadcasting system.
- the protection of "access", defined in this case as the capacity of media to incorporate and reflect the views, preoccupations and culture of its Canadian audiences.

All else is a means to an end, and not goals to be pursued for their own sake.

(ii) The Changing Character of Regulation:

One can distinguish three periods in the CRTC's history with respect to the attitude of the agency to regulation. They are, as follows:

The Pro-active Phase 1968-73/5:

From its establishment until perhaps as late as 1975, the agency saw itself acting as a strongly independent tribunal, but one distinguished from its American

counterparts by its attitude towards its task, its objectives and its view of the role of the public in decision making.

The orientation to regulation was initiatory. A number of quite innovative measures were designed, discussed and implemented as a means of specifying what the somewhat vague and all-encompassing mandate of the CRTC should mean in practice. Canadian ownership, Canadian content regulations, the policy on "the single system" (which defined a role for cable in the Canadian broadcasting system), the emphasis on northern service and on community access and of course the FM policy are all policies from this first phase. They are all distinguished by the pro-active stance they incorporate toward the implementation of public policy. In effect, the CRTC saw itself as the delegate of the legislature which had enacted the Broadcasting Act.

Combined with this initiatory stance was a willingness to deal directly with issues concerning the quality of programming content. In no sense should the measures introduced by the CRTC in this time period be considered as a form of censorship. Yet the agency did institute controls to support journalistic integrity, the fair presentation of controversial issues, the distinctiveness of different broadcasting services and stations. It attempted to define how the public could express their views through the media system.

The fundamental stance of the agency in this first period towards regulation was that regulation should be designed to enact rights, to effect a redistribution of resources from the private sector to the public interest goals of the Canadian broadcasting system. Public interest was defined not in terms of audience choice, but in terms of those aspects of programming and services that could not be realized even through the most efficient market system. Canadian content was an obligation of the broadcasters, derived from their use of the radio spectrum. Access on a community channel on cable was an obligation of that cable companies assumed because they held a monopoly licences to a unique distribution technology. Northern service was the responsibility of the CBC because of its national mandate.

The agency simply assumed that it was independent and free to act within its legislative mandate. Its accountability was ensured through the fairness of its

procedures. The goal was to keep the procedures simple enough that members of the public could be directly involved in broadcasting decisions. If accessibility meant lack of cross-examination by intervenors, then the Commissioners themselves would conduct the cross-examinations. If accessibility meant that limited attention would be paid to the financial or market implications of CRTC decisions, this lack would be compensated for by the capacity of the agency to engage in dialogue about the nature of the Canadian broadcasting system with members of the industry and with the public. Some trade-offs were clearly necessary; the agency chose to stress the "non-professional" aspects of broadcasting, placing reliance upon concerns expressed by laypeople, not experts.

The Managerial Phase: 1975-1981/3:

The second period in broadcast regulation became evident as early as 1973-4 and was fully entrenched by 1976 because of the addition of telecommunications to the mandate of the CRTC. Regulation in this phase can be described as managerial in orientation, reactive and flexible.

The inclusion of telecommunications in the mandate of the CRTC played a major role in the change since it changed the orientation of regulation from broadcasting to the management of the communications sector as a whole. Even though different mandates were used in broadcasting and telecommunication, most of the same full-time Commissioners were involved in both kinds of issues. At first the attempt was made to explore the applicability of the approach used in broadcasting to telecommunications, to see whether telecommunications procedures could be made accessible to the general public and telecommunications issues part of a wide-ranging public debate.

This attempt was a failure and, indeed, the approach used in telecommunication regulation gradually influenced broadcasting regulation (although the rules of procedure for the two sectors remain different today). The emphasis in broadcasting gradually shifted away from concern over the content of programming to concern about market structures, rates, ownership and competition. Emphasis on expertise, on the financial and market implications of various decisions, and on consumer service all became significantly more

important in broadcasting. The administrative burden of the agency was increased, then, not only by the additional responsibility for telecommunications, but also because of a more "expert", market-oriented and "professional" approach was taken in broadcasting.

The orientation of the CRTC to regulation in this second phase of its operations, shifted from initiation to management. The newly availability technologies and services in the United States -- such as satellites and pay television -- had an impact. It was increasingly difficult to have control over all the participants in the Canadian broadcasting system, given the technological and industry pressures for the introduction of these new services in Canada. A managerial approach was necessary, simply to determine how to proceed. As well, jurisdictional problems undoubtedly also demanded a managerial approach and regulatory policies designed to assert jurisdiction over the sector as a whole.

This managerial approach was reflected in a number of agency actions, for example: the licensing of Cancom; the formal introduction of the 3 plus 1 formula; and the rationalizing of licensing so that all stations in the same market would be renewed at the same time. In the context of decisions focussed on the system as a whole, regulation of program content -- the quality of service -- seemed somehow less appropriate. In several hearings the CRTC fumbled with the issue of quality in programming, fearing the complaint that it would be labelled as a censorship body.

The early CRTC had enacted a series of regulations. Increasingly during this second period, with the exception of the cable regulations, the agency moved away from relying on regulations (that were generally applicable) to conditions on licences. In seeking to manage a complex broadcasting environment -- with many different kinds of participants both inside and outside the regulatory mantle -- the agency had little choice but to become more flexible and responsive to a variety of demands.

During this period, the agency continued to think of regulation in terms of the rights that regulation would entrench. Within this perspective, however, a

significant change occurred. This change is most clearly reflected first in the Therrien report and later, more strongly, in the Klinge report. The initial "rights" to be established through broadcasting regulation were connected with the Canadian nature and quality of the broadcasting service. The new "rights" that were asserted during the second phase of the CRTC were the rights of all Canadians to receive the same range and choice of services, regardless of where they lived.

In effect, in its second phase of operation, the agency had two primary goals -- in fact, two competing goals. Creating a broadcasting system with a strong Canadian presence requires different regulatory priorities than does making all services -- including (and possible, especially) the American ones -- easily available. All "rights" established through regulation require cross-subsidies, (the transfer of resources within an industry from one service to another without regard for the market efficiency that could be obtained in each case). The new "rights" had different beneficiaries from the older more established ones. If the broadcasting system could not support both kinds of cross-subsidies, then a choice had to be made between conflicting goals. Some evidence suggests that the "right" to access to the full range of services took precedence over that of sustaining the strong Canadian role in broadcasting.

In retrospect, it is a strange kind of "right" -- this right to have access to all communication services regardless of one's geographic location or social situation. Access to the *same range of* choices in educational opportunities, medical services or even amenities of life is not guaranteed to all Canadians, regardless of where they live.

In fact, the decision -- and it probably was an implicit one -- to make access to the same range of choices about communication services reflects other pressures, no less real, upon the regulatory agency: the importation of foreign signals via satellite to remote areas, the defiance of regulation by unlicensed TVRO operators, the provincial claims to jurisdiction, the ambiguous status of pay television within the Canadian broadcasting system, the emphasis of the Department of Communications on the development of communications hardware. A rationale for regulation connected to delivering the same range of services to all Canadians was an effective way to assert federal jurisdiction over all aspects of the

communications and to ensure Canadian economic participation in the sector.

Supervisory Regulation: 1982- :

The last period might be said to commence in response to the pay television decisions. It is worth reviewing what the CRTC thought at the time about the pay television decision. First, pay television was established on a competitive market model, with the assumption that it was the function of the market, not the CRTC, to choose between the different services. Second it was assumed (partly because the CRTC was reluctant to licence pay television at all) that failure of any pay service should be a function of the market, not a problem for the CRTC. The CRTC had no responsibility to keep pay television, or any of its licensees alive. Third, pay television was designed to stimulate the cultural production industries. It was to provide a supplement to Canadian content regulation (although it also involved some Canadian content regulation) by involving the allocation of a percentage of licensee's gross revenues to cultural production.

The failure of the licensing model for pay television entrenched the third and current approach -- supervisory regulation. First, if the market could not sustain competition in pay television, then a choice of services could be made available by licensing new services on another basis. The problem, it was argued, with the viability of pay television was that pay television services are "general interest". The market can only support a limited number of general interest services. (With more specialty services, even less) Viewer choice can be achieved, however, by permitting narrowcasting, services designed to provide one of many different kinds of programming. These too were "pay television", but in order to justify their introduction when competitive pay television had failed (at least initially) in the market, a new category of licences was developed.

Second, given the negotiated nature of regulation, it was impossible for the agency -- any agency -- to disregard failures in the marketplace, at least with respect to its major licensees. Inevitably, the CRTC moved to prop up the major pay television licensees as a viable commercial enterprises. The underlying rationale for the licensing of pay television was dismantled in the process, but once the service had been made available to Canadians, however, there was little choice.

Finally, tying support for cultural production to the revenues of the licensees is an attractive alternative to content regulation in theory, but it has inherent drawbacks. Given the flexible, reactive and negotiated nature of all regulation, it is not surprising if the requirements for cultural support are relaxed when revenue projections fall significantly.

Ironically, since it was designed to be a more sophisticated mechanism of regulation, tying support to the revenues of licensees made their contribution to cultural producers into a kind of "tax". Cultural production ceased to be a "right" established through regulation. Instead, support for cultural producers became a kind of regulatory "safety net" for those who could not survive in an increasingly competitive international market system.

This view of regulation as a "safety net" has spread during the supervisory phase of the CRTC's operations. It has now been suggested, for example, that the CBC should also be a "safety net", that the publicly-supported network should exist only provide opportunities for cultural expression that would be precluded by an efficient market system. Canadian content regulation is now sometimes seen as only a form of "protectionism", similar to that provided to other fledgling or threatened Canadian industries. The dangers in such an approach are readily apparent from the current debate about cultural sovereignty and free trade. Once support for Canadian culture is regarded as a form of protectionism, it is legitimately subject to negotiation in any free trade initiatives.

Supervisory regulation goes hand in hand with a "safety net" approach that uses market intervention as its mechanism of action in periods characterized by deregulatory sentiments. In effect, a supervisory agency can limit the necessity for action by responding only to problems as they are identified by disadvantaged groups. Once called into action, their role is again a limited one. It is simply to provide a mechanism for solving problems, arbitrating conflicts or compensating those who have been newly disadvantaged by the situation in the marketplace.

It is important to emphasize how very different this third approach to regulation is

from the other two. Unlike regulation in the first phase of the CRTC, the agency is no longer initiatory. Questions about program content and quality of service are resolved mainly through mediation (codes, for example) under the supervision (but not direction) of the agency. Benefit programs are instituted through taxes or quasi-regulatory measures. They are designed not to entrench rights but to compensate those affected negatively by market forces or regulatory decisions. The agency stands back from the sector it regulates, waiting for problems to be identified that require its intervention.

Unlike regulation in the second phase, the third approach to regulation does not require that the agency manage the sector as a whole or even the use of its scarce public resources. It does not require that the agency have an overview. Some questions have been raised in the press and by public groups about the role of regulation as a result of its new orientation. They are: What is the relation between supervisory regulation and the highly pro-active stance towards regulation embedded in the Broadcasting Act? In a simplified regulatory procedures, how can we be sure that all problems are being identified, especially if there is no funding for public interest groups? If the agency only "supervises" the system, how much of the current regulatory apparatus and powers is really necessary and justified. Why should the agency deal with ownership transactions, rates, quality of service etc. be regulated at all, unless problems have been identified with specific cases? In the Broadcasting Act, the agency was given broad and extensive powers. If it use them only to deal with problems as they arise, it risks public cynicism and backlash.

Nothing will now unravel the results of what was done in each phase of broadcasting regulation. The choices that were made by the agency at each period in its history were in response to the problems as they were identified and defined at the time. The definitions may have been askew, the responses inadequate, but no *post hoc* analysis can change what has happened. The question is now: How should regulation be approached in the future, in its fourth phase after the Task Force report? This question will be addressed after an examination of the current issues in the broadcasting environment that must be addressed by today's governments and regulators.

(iii) issues and options:

a. goals of the system:

It was suggested above that regulation now has two conflicting goals:

- * the creation of a Canadian presence in the Canadian broadcasting system
- * equality of access to the same range of services for all Canadians

Both demand extensive cross-subsidies and have implications for many areas of broadcasting. Given that decisions have been made in recent years with respect to implementing the second goal, it is no longer possible to return to the first objective only. At the very least, the core services now available to most Canadians -- including the American "3 plus 1) must remain in place, although these services do not necessarily have to be expanded further. The pressure for continuance of the second goal -- expansion of the number of different services available to all -- comes from outside the Canadian broadcasting system in any case, from technologies and policies that result in the mass importation of distant signals without respect for national boundaries.

In effect, government must decide whether or not the further importation of American signals *can* or should be controlled through the mechanism of regulation and, particularly, by providing a package of many such services (including Canadian and US services) to all Canadians *through the mechanism of regulatory cross-subsidies*. As well, a choice of priorities must be made between the two goals.

b. the character and scope of the sector to be regulated:

One could describe the chronology of broadcasting regulation as a chase for control over technology. This chase has been made necessary for two reasons. First effective management of the Canadian broadcasting system, as it has been conceived traditionally, demands that all segments of the industry be brought under the regulatory mantle. Second, regulators have been subject to jurisdictional pressures resulting from the importation of US signals and provincial claims. There are two choices available at this time:

- * a major revision of the Broadcasting Act so that it incorporates all the relevant technologies and services, including some not yet available.
- * a reassessment of the goals of regulation and revision of the Broadcasting Act and regulatory regime so that they reflect fewer, more well-delineated objectives and less necessity for comprehensive control of the system.

The first option rests on several assumptions. First, it assumes that a distinction can

be drawn between programming and non-programming services, between cable and other distribution facilities offering the same consumer services, between pay and specialty services and even between radio and television. It assumes these distinctions can be made fairly for all participants in the system. Second it assumes that control can be exercised in the system at the "gateway" of cable distribution, and that cable is necessarily, therefore, the only "gate" to the system of distributing signals. Third, it demands a strong managerial approach to regulation itself.

The current choice of the first option seems to be dictated by history. Traditionally, services have been distinguished from each other, cable has been legitimately considered as the "gateway" to distribution, the CRTC is assumed to be the manager of the resource. Questions can and must be raised, however, about the degree to which these conditions still hold:

If an information service, using an alphanumeric form of presentation provides the same news or financial information as the radio commentator, is one "programming" and the other not?

If telephone companies can provide many of the services available through cable, why are they regulated differently? Why not other companies too?

Is cable the only gateway to the system, a "natural monopoly"? Or has the existence of Cancom, with the possibility of local distribution networks even in urban areas, changed all that?

What impact do the new distribution technologies, mainly originating in the the United States have upon cable's status as the "gateway to the system"?

Why is Cancom regulated differently than cable, in terms of its rates or channel allocations?

Can an agency oriented to "supervision" act as a manager of a public resource?

A relatively simple expansion of the coverage of the Broadcasting Act will not provide answers to most of these questions. Nor will it answer the charge that the current system treats providers of the similar services differently and thus, unfairly? The effort, in the

CRTC's early initiatory phase, was to insert market barriers between different types of service and to maintain those barriers as a key component of regulation (the FM policy) It has not been very successful. In the current supervisory phase of the CRTC, the likelihood of successfully inserting and maintaining regulatory market barriers between different services -- especially if the differences between the services are based on historical reasons -- is very small indeed. Obviously, there is a need to consider the second option more closely. There is a need to consider whether the scope of regulation can be delimited to the point that regulatory control over the *whole* sector is no longer necessary.

c. broadcasting or narrowcasting - dealing with special interests:

A distinction has conventionally been made between broadcasting and narrowcasting, in that broadcasting is designed for a general audience while narrowcasting is intended to serve the specialized needs of minority audiences. In the Canadian broadcasting system, this distinction has been maintained at least in television, even in light of licensing services for minority interests, in several ways: First, each licensed station is supposed to be balanced with respect to diversity of views. Second, each station carries at least two types of program content. Third, each station is supposed to be accessible to and suitable for any member of the public. The CRTC decision on religious programming further entrenched the notion that access to the radio spectrum, or to distribution systems licensed in Canada, should be on the basis of broadcasting not narrowcasting.

Several recent decisions, and some impending ones throw the current distinctions between broadcasting and narrowcasting into question. It is likely that more narrowcasting is being licensed than is commonly acknowledged. If so, the impact on broadcasting services of an extensive narrowcasting service -- catering to special interest groups -- will be very significant indeed, if pay television is any guide. Recent developments in this regard are, as follows:

- * pay television services were licensed as general interest services, but in their initial phase at least, tended to appeal to specialized audiences ("adult") with specialized tastes.
- * neither pay nor specialized services provide a full range of program content, but each caters instead to audiences in terms of a single interest .
- * multicultural services or third language services are narrowcasting in the sense of being designed for a particular audience segment only.

- * information services, while not regulated directly as broadcasting, are often designed to be narrowcast, in the sense of appealing to particular segments of the audience only.

None of these new services fully undermines the approach taken to limiting television access to the radio spectrum or distribution of signals to broadcasting, but they begin to blur the distinction between broadcasting and narrowcasting. There will be increasing pressure from many special interest groups, who see ethnic programming as a precedent, to have access to the broadcasting system. The importation of special interest services from the United States will exert similar pressure.

The choice to be made, then, is whether -- and if the answer is yes -- in what way can special interests be accommodated within a broadcasting system without altering the basic nature of the system. The answer lies partly upon the technical capacity of different aspects of the system, in whether enough channel capacity is available in the foreseeable future to accommodate all legitimate demands for special interest programming. And following from this, can a system be designed that will protect the interests of groups yet to express their demand or groups who have a shortage of resources? Do we want to allocate channel capacity on the basis of first come, first served, as is now being done, or on the basis of ability to pay? Is the CBC's unique role to be the "broadcasting" service available to all Canadians? The choice is between deciding how to respond to the introduction of narrowcasting in the Canadian broadcasting system or being backed into a particular set of priorities on the basis of a case-by-case evaluation of new services that fall between the traditional definitions of broadcasting and narrowcasting.

d. quality control:

Compared to regulatory authorities in other jurisdictions, the CRTC had little difficulty in dealing with questions about the quality of program content. The policy established on controversial broadcasting is worthy of emulation by regulatory authorities in other countries. A standard of journalistic integrity has been established.

Even with its problems, the FM policy is a genuine contribution to the debate about how to establish quality in programming. Instead of relying on "cultural" definitions of high quality programming ("Arts, Letters and Science"), the FM policy is based on the assumption that

there is both a high quality and low quality standard of programming for every taste. High quality programming is programming that attracts the attention of the listener; low quality programming, at best, is like audible wallpaper. The FM policy seeks to establish a mechanism for distinguishing between "foreground" and "background" programming and for ensuring that at least some of the programming tailored for every taste on FM is worthy of attentive listening. Compared to what other national regulatory authorities have achieved with respect to quality of programming, these measures are successful. Compared to what is available over the air in other countries -- those without extensive public broadcasting -- Canadian FM stations are worthy of note. This is true, even if one considers that the FM policy has failed in many respects.

The FM policy, the "Air of Death" decision, the inquiry into the national service -- these were all measures undertaken in the initial phase of the CRTC's regulatory mandate. Since that time, other issues have been raised that complicate the problem of ensuring a high standard of programming. They are, as follows:

- * the CRTC never had adequate powers to deal with issues related to program content, even assuming that it is not intended to be a censorship body. No provision exists for the agency to deal with complaints about misrepresentation of persons, except through hearings connected to the status of a licence. This is like hitting a fly with a sledgehammer,
- * In its managerial phase, the CRTC was reluctant to engage in pre-emptive regulatory actions, preferring instead to deal with applicants and licensees in terms of the problems they presented. In licensing pay and specialty services, only minimal attempts were made to control the quality of programming prior to licensing. The content of so-called "adult" programming was not discussed fully in hearings before pay television licences were granted; the impact of liquor company involvement in services designed for a teenage and young adult audience was not addressed sufficiently in hearings about specialty services. Controlling program content after the fact -- after it has been made available to the public -- is tantamount to censorship, even if the public demands such controls.
- * In response to this situation and because of the supervisory orientation of the CRTC in its third phase of operations, reliance has been placed upon the standard

setting activities of industry or specialized groups who develop codes that can then be adapted and supervised or enforced through the CRTC. The models are the Advertising Standards Council and the Task Force on Sex Role Stereotyping. Unfortunately, both are anomalous in that they operate as consensus bodies, while other standard setting bodies -- such as those used in broadcasting and pay television -- are not. Public involvement in broadcast or pay television codes is "after the fact" and limited to the extent that the recognition and supervision of these codes by the CRTC is deemed inadequate.

There are several courses of action to be taken if the objective is to establish mechanisms for ensuring quality of service. One might return to the initiatory stance of regulation, since -- ironically -- this caused the fewest problems with respect to censorship. Establishing a mechanism for handling complaints about misrepresentation outside the jurisdiction of regulatory authorities, establishing standards for the quality of program content of new services before they are licensed and seeking provisions in the promise of performance to ensure "quality control" are all possible initiatory measures compatible with the regulatory reality of today. If codes are to be used extensively, then another option is to ensure that only those codes set through a consensus procedure -- with public participation in their development and some mechanism for self-enforcement -- are sanctioned by governmental authorities.

e. access:

The Canadian broadcasting system is unique in its orientation to questions of access. In the United States, access provisions refer either to the rights of individuals to seek "equal time" in cases of misrepresentation or bias. More recently, access in American broadcasting has been defined from the perspective of "safety net" regulation to mean providing "the information poor" (and those with special needs) the opportunity to use airtime. In Canada, access provisions are not designed to foster individual rights nor even to support the rights of special interest groups. Instead, access is defined as a "right" entrenched through regulation. It means: access to a role in decision making through participation in CRTC hearings; an access channel available to all groups -- disadvantaged or not -- for the debate of community issues and community oriented programming; access to equality of choice in services; community and native radio.

A serious danger exists in any program of reregulation that the access provisions of the Canadian broadcasting system will be altered or lost. If cable were deregulated, for example, or treated as a carrier rather than as a broadcaster, special measures would be necessary to ensure the survival of the community channel. Reregulation, or an increasing commitment to a supervisory role for the CRTC, might well diminish the opportunities for full public participation in decision making, if specific decisions (rates) are deregulated or if public hearings are used less frequently.

The choice to be made, then, is a fundamental one. It is about the importance of the type of access that has characterized the Canadian broadcasting system at its best. Either access provisions must be strengthened and protected during the next period of change or the definition of access changed to reflect the new regulatory realities.

f. the public broadcasting service:

Public broadcasting has undergone the most significant change of any aspect of the broadcasting system. The CBC has gone from being the primary service for all Canadians to the current situation where some argue that the public network should only "fill in the gaps" in programming more properly provided by the private sector. The question is whether public broadcasting is a basic value (reflected in the quality of life of Canadian society), or a right to be entrenched through regulation or a way of compensating cultural producers and minority audience for the lack of service or opportunities available through private broadcasting. This is not a decision to be made lightly, for it reflects some fundamental assumptions about the role of broadcasting.

The problem with the current confused perspective towards public broadcasting has several root causes:

- * if public broadcasting is a value it should be entrenched through legislation, and so it is.
- * but the legislation involved is the Broadcasting Act, which sets up a system of regulation intended for the private sector mainly and designed to entrench rights not sustain values.
- * as a result, the CBC has a dual, conflicting status within the Canadian broadcasting system. On one hand, it is a regulated entity, on a par with private broadcaster

and accountable to the CRTC, and, on the other, it is a specially legislated service, responsible to parliament, having broad public interest goals.

- * the public service is not one service, but two, since many CBC affiliates operate within the private sector.
- * in any case, the CBC has a very broad mandate, but the network is subject to insecurity with respect to the resources necessary to implement the objectives of its mandate.

The history of the CRTC regulation of the CBC is not a very impressive one. Almost all major initiatives of the CBC have been rejected, but because the agency is mainly reactive, it cannot recommend alternatives. The CBC has been subject to many of the same standards as private broadcasters. Such standards make a mockery of the legislated objectives for the CBC. Since the inquiry on the National Service conducted in the mid-1970's, however, there is little evidence that CRTC regulation has influenced the quality of service of the CBC. Accountability for CBC decisions has been diffused, not strengthened by the existence of two bodies (parliament and the CRTC) -- each placing conflicting demands on the CBC.

The situation of the CBC with respect to its private affiliates is instructive. Only in a very limited sense do these affiliation agreements provide access to CBC service for all Canadians, since they are required to carry only the national network portion of CBC programming. Yet, either the CBC must pay for its own affiliate coverage or local broadcasters must subsidize CBC service in order to make the CBC available to Canadians living in smaller communities. The broadcasters in smaller communities are precisely the sector of private broadcasting for whom the obligation to support the CBC is least appropriate. Paying for the coverage of CBC national network service, on the other hand, is tantamount to providing a subsidy for private broadcasting.

There are several choices with respect to the public broadcasting service. One could integrate the public service fully under the regulatory regime, entrenching it as a right to be supported through subsidies and cross-subsidies. A special tax on private broadcasting and related services would probably be required, to replace the contribution now made through general revenues in support of the CBC. The mandate for such a CBC would be significantly changed, however. The CBC would exist to provide some component of the broadcasting system that was exclusively devoted to Canadian cultural production. Other obligations of the private broadcasters in this regard would have to be significantly reduced to compensate for the special tax. The relationship with the affiliates would remain unchanged, but the

obligations to support the CBC service would be more fairly distributed.

Alternatively, one could view the CBC as a special benefit, a service designed to do what the Canadian broadcasting system, operating through the private market system, cannot or will not do. The mandate of the CBC would then be simply to provide resources and access for Canadian cultural producers and socially disadvantaged groups and to program for minority interest tastes. The funding mechanisms for such a CBC would remain unchanged, but its legislated mandate and its place within the Canadian broadcasting system would be radically transformed. An assessment would need to be done about the affiliation agreements. Why should such a service be obligatory for all Canadians, since it would respond to minority interest tastes only? Why should it be financed publicly or operated as public broadcasting? These are legitimate questions if one assumes that the CBC service is simply a "special benefit", made necessary because of the current inadequacies of the market.

Finally, one could recognize the existence of a public broadcasting service as a component of the quality of life Canadians enjoy. As such, it should not be regulated, especially in conjunction with private broadcasting. Instead, it should have its own legislative mandate and clear mechanisms for its own parliamentary accountability. The arrangements with the affiliates would then be phased out, by drawing upon the resources offered by satellite and local distribution systems (including the expansion of low power rebroadcasters).

f. Canadian content regulation:

Four approaches have been taken with respect to Canadian content regulation. The first is that of imposing quotas for the allocation of broadcasting time to Canadian content. This approach has the advantage of ensuring "shelf space" for Canadian production, but the disadvantage of leaving broadcasters to determine their financial commitment to the programming itself. The second approach has been to provide incentives for Canadian content, through the recently created Broadcasting Fund for example. The initial experience with the fund has been sobering. The cost of Canadian cultural production is greater than most private broadcasters have been willing to pay, even with the incentives offered through the fund. The fund supports Canadian cultural production, but it cannot guarantee its existence.

The third approach is that taken with pay television. The intention in the case of pay television was to tie the level of support for cultural production to the gross revenues of the licensees and to make this support available to independent producers. Combined with phased in Canadian content quotas, these measures were supposed to rectify the problems with previous content regulation. The result might have been predicted from a knowledge of the characteristics of regulation. The commitment to Canadian cultural production became an item for negotiation and, given the problems experienced with pay television, support was curtailed sharply from the original projections. No one would argue today that pay television has been the savior of the Canadian production industry.

Finally, the CRTC has experimented with using conditions on licences as a means of ensuring particular types of Canadian programming is made available, again tying the level of support to the revenues of the broadcaster. These actions have met with resistance from the industry. The CRTC is hampered in dealing with infractions of the conditions on license: because the offence is usually too limited to require a special hearing or consideration of licence revocation of an available station.

If these are the only options, then the prognosis for establishing a strong Canadian presence in the Canadian broadcasting system is indeed poor. Content regulations have been successful in radio, where the costs of production and programming are low. In television, content quotas are more successful than other measures, but still are cause for concern.

There is a fifth approach, which when combined with others, might provide a measure of success. Broadcasting regulation rests on the assumption that Canadian services make use of a scarce public resource (the radio spectrum) that has been allocated to Canada by international convention. It is reasonable to assume that Canadian services should have first priority for access to this resource (and others benefits from regulation, as well), just as Canadian telecommunication services have first call on access to the resource offered by the Canadian satellites.

What are Canadian services? The implicit definition until now has been that broadcasting services are Canadian if they meet the Canadian content quotas, but these are minimum standards that not always easy to enforce. More important, no incentives exist for broadcasters to meet more than the minimum standard of Canadian content. Services with a greater proportion of Canadian content have not received first priority in the allocation of the

benefits resulting from regulation. The fifth approach is simple: it is to grant first priority in allocating access to the radio spectrum and other benefits resulting from regulation on the basis of the proportion of Canadian content, with the simple rationale that Canadian services should have priority in the allocation of Canadian resources. How this might be achieved will be discussed in the recommendations to this report.

h. the administrative burden:

The current Broadcasting Act, the agency mandate and powers, the scope of agency decision-making and the changes in the broadcasting environment place an intolerable burden either on public expectations of regulation or upon those called upon to assume the task. As well, the more any agency seeks to change the structure of markets (competition/monopoly etc), the greater the complexity of regulation will be. The current supervisory orientation of the regulator is a response to the burden imposed by full management of the broadcasting and telecommunications system under the present mandates. Unfortunately, it results in a widespread perception of regulatory inaction.

What are the options, given the increasing burden of regulation and the public disillusionment that results from apparent regulatory inaction? The answers are to be found in returning to the basic rationale for broadcasting regulation and determining from this rationale, what is essential and what can be discarded in the current regulatory regime?

The rationale for broadcasting regulation is centred on the characteristics of the radio spectrum, a small portion of which is allocated for use in Canada. As a scarce public resource, subject to international convention, the radio spectrum is and should be subject to management. This management calls for: (1) a process for the allocation of access; (2) application of a set of priorities to determine who should have access; (3) the protection of users of the spectrum from technical interference; and possibly (4) the reservation of some of the spectrum for public use. These four managerial functions can be accomplished through regulation, or by simply granting permits and certificates.

The radio spectrum is a particular kind of resource. There is a public interest connected to the dissemination of information and, more particularly, to a national communication system. From this public interest, further rationales for broadcasting regulation emerge, although none requires the specific form of regulation that exists today. Any or all of the following rationales might be added to the list above. All require

governmental involvement in broadcasting, but none require that involvement to be in the form of regulation specifically.

- (5) As the portion of the radio spectrum under discussion is a Canadian resource, Canadians should have priority in claiming access to it.
- (6) Because it is a Canadian resource and is used to disseminate news and information, all licensees should be Canadian.
- (7) Canadians producers might legitimately claim "shelf space" for their programs on any service which makes use of the Canadian portion of the radio spectrum.
- (8) One might require that the news and information made available on the Canadian portion of the radio spectrum be produced by Canadian broadcasters.
- (9) Finally, a rationale for regulation could be connected to the need for quality control over services using the radio spectrum, to ensure that the resources is not squandered but serves some demonstrable public interest.

In this list of rationales for broadcasting regulation, where is a basic rationale for the regulation of ownership transactions -- other than in relation to Canadian ownership? Ownership regulation might be considered as a means to an end, as a way of achieving quality control or diversity of information. The case would have to be made, however, that regulation did, in fact, encourage "quality control" or diversity of information. Alternatively, one might find a rationale for ownership regulation in conventional regulatory theory, by talking about the deleterious effects of concentration of ownership. The onus would be upon those arguing for regulation on this basis to show why the broadcasting industry should be singled out for special concern and how regulation prevented concentration of ownership. Again, the case might be made, but it should be made specifically and in relation to the CRTC's experience with the regulation of ownership transactions.

Is there a convincing rationale for cable regulation? The traditional rationale for regulating cable (upheld in many court decisions) is that the distribution of signals is part of the single (and indivisible) system of broadcasting. From this perspective, cable is simply an extension of the existing distribution system -- a rebroadcaster in effect. In the face of the complexity of the numerous new distribution technologies, this rationale is hard to sustain for cable alone. Should all distribution technologies be regulated on the same basis as cable

now is? In fact, they are not.

Should cable should be regulated, then, because it is a natural monopoly? If cable is a natural monopoly, then any discussion of alternative distribution systems is naive. The traditional rationale for the regulation of natural monopolies can be brought to bear. What if cable is not a natural monopoly -- what if the licensing of Cancom and possible licensing of DBS makes alternatives to cable available to Canadians for the reception of Canadian and other distant signals? Do alternatives for cable now exist, or will they exist in the immediately foreseeable future? These are technical questions, not regulatory ones. From the point of view of establishing the rationale for regulation, it is necessary to address these technical questions first. It cannot be assumed that what has historically been true -- that cable is a natural monopoly -- remains so today.

Finally, a rationale for regulating cable could be that cable provides a service which is invested with public interest, in other words, a necessary service. There is no doubt that cable television brings much enrichment to the lives of many people, but cable service cannot be considered essential. Were cable to be deregulated, however, the question arises of whether particular groups in society -- those least able to bear the loss, such as older people -- would suffer unduly. The rationale for regulating cable rests partly in this fact, that cable regulation has made cable service available to segments of the population who would likely be deprived of it, or any reasonably priced alternative, if cable were deregulated. Is this a sufficient basis for the regulation of cable? Perhaps.

The point of this exercise in justifying different kinds of regulation is to illustrate how the Canadian broadcasting system can be viewed in terms of all of its components and how the rationale for regulating each component of the broadcasting differs from others. If the administrative burden of regulating the Canadian broadcasting system is too great, then the rationale for regulating *each* segment of it must be examined to determine which aspects of the system can and should be deregulated. The alternative approach is to select particular regulatory functions for deregulation -- such as rate regulation in cable -- and thus to reduce the capacity of the regulators to regulate by taking away some of the more important incentives/disincentives they have for influencing corporate behavior.

i. enforcement:

The most serious concern expressed regularly about broadcasting regulation is about the enforcement of regulations and regulatory decisions. The exercise of regulation is often seen to be a symbolic one, the agency to be "captured", and the regulatory agency as "toothless". The problem lies partly in the character of regulation as a form of negotiation that requires a high level of co-operation between industry and government to achieve compliance with public policy goals. It is too simple to blame regulation, however, for the failure of any agency to convince the public that it is serious about enforcement.

In the case of the CRTC, the problems with enforcement also lie partly in the powers granted to the agency under the Broadcasting Act. Under the Act, the agency is limited to recommending that government take action through the courts or to raising questions about the status of a licence. For many regulatory infractions, the latter course of action is often out of proportion with the level of non-compliance involved. Indeed, often non-compliance is a product of many small actions, no one action being sufficient to cause a response from the CRTC with respect to the status of the licence.

One option to increase public confidence in regulatory enforcement is simply to remove some aspects of broadcasting from regulation and to seek enforcement either under the supervision of a regulatory authority or by some other means. Legislating particular objectives, such as should now be done with the order-in-council on Canadian ownership, would simplify the problems of regulatory enforcement. Abusive programming would be much easier to "regulate" if the provisions of the Human Rights legislation were legislatively applied to broadcasting.

Another, complementary option would be to change the status of the promise of performance, rewriting the Broadcasting Act to make it a statutory contract. As such, the Broadcasting Act would have to stipulate that each licensee must enter a contract with the CRTC with respect to its promise of performance. A revised Broadcasting Act would also have to stipulate that the regulator have the powers to order the rectification of any breach of performance, to levy fines and to revoke licences. Appeals to such provisions in the Broadcasting Act would, in this case, be to the Federal Court of Appeal.

Such measures would have an interesting side effect beyond that of making regulatory decisions more realistically enforceable. The regulation of ownership transactions could be deregulated, since any new owners would assume legal obligation for the contract in effect at the time of purchase. Public hearings would be required as a result of ownership

transactions only if the new owners wished to alter the terms of their promise of performance. Given the current difficulty of predicting compliance from prospective owners at public hearings on ownership transactions and the current lack of competitive bidding in the licence renewal process, the "contract" model is likely to be a significant improvement.

The Fourth Phase - Recommendations:

The Task Force on Broadcasting represents a potential moment for a change, the creation of a fourth phase of broadcasting. Obviously it is not possible to return to square one. The administrative burden on the agency, the complexity of the sector to be regulated, the current deregulatory sentiment and the legacy of past decisions has shaped the available options. Nonetheless, it is possible to reach into the past, to select from the past approaches taken by the CRTC, some aspects of a better system of regulating broadcasting. It is also possible to focus on the problems identified in this report (and from other research) and shape the fourth phase of broadcasting policy since 1968 as a response to those problems.

From the first phase, it is important to learn how innovative broadcasting policies can be. It is not always necessary to take the conditions in the industry as given, as impermeable to change. Broadcasting policy, as enunciated in the Broadcasting Act, is designed to sustain values and entrench rights. The best mechanism for sustaining values may not be regulation, however, but legislation. Canadian ownership of Canadian broadcasting facilities is one policy that has never been subject to negotiation and that remains today, after eighteen years of regulation, a basic value entrenched through broadcasting policy. Other similar values that might be achieved through legislation are, as follows:

- the public broadcasting service, operating as a general interest service for all Canadians in a broadcasting environment increasingly characterized by narrowcasting to special interest groups.
- access provisions and public rights to participation in the design and development of the Canadian broadcasting system.
- provisions for quality control of program content to ensure fair coverage and mechanisms for handling complaints about misrepresentation.
- control of abusive comment and "hate literature" on the airwaves.

From the second phase of regulation, it is instructive to note how important is a managerial approach and to raise questions about whether regulations are always the best mechanism for influencing corporate behavior. The complexity of the sector and the administrative burden of effective management require that some selection occur in determining the scope of management conducted through regulation. In other words, the question must be asked: Just what aspects of broadcasting is it necessary and justified to manage?

The basic rationale for managerial regulation rests upon the nature of the radio spectrum as a scarce public resource. Regulating any other aspect of the broadcasting system must be justified specifically, in light of the changing technologies and conditions in the industry. The answer may not lie in deregulating cable -- at least not in the short term -- or other production services and distribution technologies. At the very least, however, the basis for regulation of such services as pay, specialty and cable must be re-examined, even if jurisdictional issues arise in the process. In effect, one aspect of the character of broadcasting policy in the fourth phase should be selective regulation.

This orientation to regulation fits well with the reality that created supervisory regulation - the great difficulty of managing a complex and rapidly changing sector of the economy under a single regulatory authority. Unlike the third phase, however, it is necessary for the regulation which remains to be **pre-emptive in orientation**. Regulating after the fact, simply being responsive to problems and limiting public debate of issues in broadcasting by curtailing public hearings inevitably all create cynicism. They create public backlash, and a perception of the agency as insufficiently responsive to its legislation and to public concerns. After the recent sad experience with banking and health inspection connected to regulation, governments should be especially wary of a problem-centred approach to regulation.

Finally, three problems require immediate attention: the status of the CBC within the broadcasting system (and in relation to the regulatory agency), the fairness of procedures and regulatory enforcement.

In sum, then, the recommendations that emerge from the analysis are, as follows:

(1) the creation of a fourth phase of broadcasting policy characterized by significant new legislative initiatives (access, quality of service etc), a revision of the Broadcasting Act.

separation of the public and private services and selective and pre-emptive regulation of private broadcasting.

(2) the inclusion of provisions in the revised Broadcasting Act requiring statutory contracts with licensees specifying their promise of performance.

(3) the inclusion within the powers of the CRTC of the power to rectify any breach of contract, the power to levy fines as well as the current powers to revoke any licence.

(4) subsequent consideration of deregulation of ownership transactions in private broadcasting.

(5) assessment of the scope and rationale for each aspect of regulatory control over the sector, with consideration of phasing out regulation of cable, except as a carrier, and of the current mode of regulation of cable rates.

(6) retention of the 3 plus 1 formula for the provision of extension of imported services (on all distribution services), but curtailment of further cross-subsidization of the provision of imported signals to all Canadians regardless of where they live.

(7) The establishment of categories of licence in terms of the proportion of Canadian content carried and institution of a priority system of access to a variety of "benefits" of regulation on the basis of their Canadian content, with the rationale that the resource involved is a scarce Canadian one. Such "benefits" might include:

- for applicants for new licences, access to the radio spectrum on the basis of proportion of Canadian content (all else being equal)
- for existing licensees, access to the channel capacity in the "basic service" and various tiers (after the 3 plus 1 services have been provided) on the basis of proportion of Canadian content (access to the "basic service" or tiers determined at licence renewal time only or when new applicants licensed, as is the case presently)
- for all program producers, access to the Broadcasting Fund -- all else being equal
- for support of proposed productions.

- consideration of reregulating advertising content in broadcasting and other services to reflect priority being given to services with a greater proportion of Canadian content (and deregulation of existing advertising quotas).

- reassessment of Canadian content quotas for pay and specialty services, if these services continue to be regulated.

- reassessment of the Canadian content quotas in Canadian broadcasting, with the possible substitution of a minimum standard of designated numbers of hours in three categories of programming (news/information, variety, drama) for stations and networks of different sizes. These minimum quotas would be entrenched in legislation and extended in the promise of performance contracts.